FILE COPY

Office - Supreme Court, U. S.
FILED
APR 26 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

No. 979

[redacted],

Petitioner,

vs.

[redacted],

Respondent,

[redacted],

Intervenor-Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

[redacted]
[redacted] Building, Toledo 4, Ohio,
[redacted]
[redacted] Building, Toledo 4, Ohio,
[redacted]
[redacted] Building, Toledo 4, Ohio,
Attorneys for Railway Labor Executives' Association.

Of Counsel:
[redacted],
[redacted] Building, Toledo 4, Ohio.

IN THE

Supreme Court of the United States

October Term, 1945

No. 970

ABRAHAM FISHGOLD,

Petitioner,

vs.

SULLIVAN DRYDOCK & REPAIR CORPORATION,

Respondent,

ROY GRANATA, ETC.,

Intervenor-Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

FRANK L. MULHOLLAND,
741 Nicholas Bldg., Toledo 4, Ohio,
CLARENCE M. MULHOLLAND,
741 Nicholas Bldg., Toledo 4, Ohio,
WILLARD H. McEWEN,
741 Nicholas Bldg., Toledo 4, Ohio,
Attorneys for Railway Labor Executives' Association.

Of Counsel:
MULHOLLAND, ROBIE & McEWEN,
741 Nicholas Bldg., Toledo 4, Ohio.

INDEX

Page

Statement of the case 4

Questions presented 5

Argument 7

General statement 7

I. The position to which a veteran is entitled to be restored does not guarantee him continuous work for one year without regard to his or other employees' seniority rights 9

A. The Act intended to prevent the loss of rights and benefits to which the veteran's pre-existing employment contract entitled him 9

II. A temporary release from work during a continuing employment relationship is not a discharge within the meaning of the Act 18

III. The granting of greater employment rights to reemployed veterans than those which they would have acquired if they had not left their former employment cannot be morally justified .. 20

IV. The granting to reemployed veterans of greater employment rights than those which they would have acquired if they had not left their former employment is impractical and destructive of long established rights 22

V. As interpreted by District Court below, Section 8 of the Selective Training and Service Act is unconstitutional 25

Conclusion 30

TABLE OF CITATIONS

Page

American Cystoscope Makers case, 24 W. L. R. 196.... 16

Arbitration between Dow Chemical Co. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local No. 804 14

Aulich vs. Craigmyle, 248 Ky. 676, 59 S. W. (2d) 560... 11

Boucher vs. Godfrey, 119 Conn. 622, 178 Atl. 655..... 11

Burroughs vs. Riss and Co., 179 S. W. (2d) 473, (Mo. App.) 18

Congressional Record, Volume 86, Part 9, page 10,108.. 24

Continental Ill. Natl. Bank & Trust Co. vs. Chicago, Rock Island & Pacific Ry. Co., 294 U. S. 648..... 27

Corpus Juris, Volume 39, pp. 79-80..... 18

Donovan vs. Travers, 285 Mass. 167, 188 N. E. 705...11, 27

Droste vs. Nash-Kelvinator Corp..... 17

Erdette Hosiery case, 24 W. L. R. 209..... 16

Estes vs. Union Terminal Co., 89 F. (2d) 768..... 28

Evans vs. Louisville & Nashville R. Co., 191 Ga. 395, 12 S. E. (2d) 611..... 27

Fine vs. Pratt, Tex. Civ. App. 150, S. W. (2d) 308..... 28

Firestone Tire & Rubber Company and United Rubber Workers of America, 17 L. R. R. 77..... 15

General Motors Corporation case, 24 W. L. R. 155..... 16

Gleason vs. Thomas, 117 W. Va. 550, 186 S. E. 304.... 27

Goodyear Tire & Rubber Company, 23 W. L. R. 89.... 16

Griffin vs. Chicago Union Station Co., 13 F. Supp. 722.. 28

Hall vs. Union Light, Heat and Power Co., 53 F. Supp. 817. 17

Highland vs. Russell Car & Snow Plow Co., 279 U. S. 253. 27

Page

In Re Arbitration Between Timken Roller Bearing Company and United Steel Workers of America, etc., 16 L. R. R. 158 14

International Association of Machinists vs. State, 15 So. (2d) 485 18

Interstate Commerce Commission vs. Oregon-Washington Railroad & Navigation Co., 288 U. S. 14 25

Keystone Lime Works, Inc., 21 W. L. R. 495 16

Ledford vs. Chicago, Milwaukee, St. Paul & Pacific R. Co., 298 Ill. App. 298, 18 N. E. 705 28

Lynch vs. United States, 292 U. S. 571 26

Murray case, 25 W. L. R. 217 16

National Labor Relations Board vs. Jones & Laughlin Steel Corp., 300 U. S. 1 25

Nebbia vs. New York, 291 U. S. 502 29

Nord vs. Griffin, 86 F. (2d) 481 28

Olin Industries, Inc., vs. Jos. Barnett 17

Pacific Cotton Mills case, 21 W. L. R. 507 16

Pittsburgh Plate Glass case, 24 W. L. R. 104 16

Ryan vs. New York Central R. Co., 267 Mich. 202, 255 N. W. 365 11

Scovill Mfg. Co. and International Union of Mine and Smelter Workers, etc., 21 W. L. R. 200 16

Shaup vs. Grand International Brotherhood Locomotive Engineers, 223 Ala. 202, 135 So. 327 11

Stephenson vs. New Orleans and N. E. R. Co., 180 Miss. 147, 177 So. 509 28

Stitt vs. Locomotive Engineers Mutual Protective Association, 142 N. W. 1110, 177 Mich 207 18

United States vs. Shreveport Grain and Elevator Co., 287 U. S. 77 26

IN THE

Supreme Court of the United States

October Term, 1945

No. 970

ABRAHAM FISHGOLD,

Petitioner,

vs.

SULLIVAN DRYDOCK & REPAIR CORPORATION,

Respondent,

ROY GRANATA, ETC.,

Intervenor-Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

MOTION OF RAILWAY LABOR EXECUTIVES' ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Now comes Railway Labor Executives' Association, and respectfully moves the Court for leave to file a brief *amicus curiae* in the above entitled action, and in connection therewith, represents to the Court as follows:

1.

Railway Labor Executives' Association is a voluntary unincorporated association, with which are affiliated the

following standard international railway labor organizations:

Brotherhood of Locomotive Firemen & Enginemen
Order of Railway Conductors of America
Switchmen's Union of North America
Order of Railroad Telegraphers
American Train Dispatchers' Association
Railway Employes' Department A. F. of L.
International Association of Machinists
International Brotherhood of Boilermakers, Iron Ship Builders & Helpers of America
International Brotherhood of Blacksmiths, Drop Forgers and Helpers
Sheet Metal Workers' International Association
International Brotherhood of Electrical Workers
Brotherhood Railway Carmen of America
International Brotherhood of Firemen & Oilers
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen of America
National Organization Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
International Longshoremen's Association
Hotel and Restaurant Employees' International Alliance and Bartenders International League of America

The principal office of said Association is located at 10 Independence Avenue, S. W., Washington 4, D. C.

2.

The standard international railway labor organizations affiliated with Railway Labor Executives' Association represent for the purposes of collective bargaining under the Railway Labor Act more than one million railroad employees, and each of said affiliated organizations is a party to collective bargaining agreements between it and

virtually every railroad in the United States. Such agreements, among other things, contain rules and working conditions which are in part based on the seniority rights of employees as those rights are defined in such collective bargaining agreements.

3.

The issues involved in this case concern the right of a formerly employed veteran to be returned to his former position and to be retained in such employment for one year without regard to the rights to which he would be entitled under existing collective bargaining agreements.

4.

Some of the organizations affiliated with Railway Labor Executives' Association have already been faced with claims of super-seniority by returned veterans and have been threatened with suit in connection with such claims. The rights of said organizations and the employees whom they represent will be determined in this proceeding without opportunity for hearing to them unless Railway Labor Executives' Association is permitted to file a brief and express its views herein as *amicus curiae*.

Dated at Toledo, Ohio, this 18th day of April, 1946.

Respectfully submitted,

FRANK L. MULHOLLAND,
741 Nicholas Bldg., Toledo 4, Ohio,
CLARENCE M. MULHOLLAND,
741 Nicholas Bldg., Toledo 4, Ohio,
WILLARD H. McEWEN,
741 Nicholas Bldg., Toledo 4, Ohio,
Attorneys for Railway Labor Executives' Association.

IN THE

Supreme Court of the United States

October Term, 1945

No. 970

ABRAHAM FISHGOLD,

Petitioner,

vs.

SULLIVAN DRYDOCK & REPAIR CORPORATION,

Respondent,

ROY GRANATA, ETC.,

Intervenor-Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF OF RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

STATEMENT OF THE CASE

Since the briefs of the parties to this action will undoubtedly contain detailed discussions of the facts herein involved, we shall refer to them only briefly.

The respondent company and Local No. 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O., were parties to collective bargaining agreements during the entire period of time which is relevant to the issues in this case. These agreements provided in substance that promotions, reclassifications, increases or decreases in the working force should be based upon length of service and ability. The petitioner was employed by the respondent company as a welder and prior to his induction into the armed forces, was an employee whose working

conditions were governed by the above mentioned collective bargaining agreements. He was inducted into the army on May 22, 1943, and after honorable discharge was restored to employment by the respondent company on August 25, 1944. He was steadily employed until April 9, 1945, on which day he was not permitted to work because of the provisions of the collective bargaining agreement relating to his length of service, *i.e.*, his seniority did not entitle him to work. On eight other days from April 9, 1945, to May 24, 1945, the petitioner was denied the right to work for the same reason.

This is an action by the petitioner for the payment for time lost by him as a result of the application to him of the provisions of the existing collective bargaining agreement and for a declaratory judgment to the effect that under the provisions of the Selective Training and Service Act, the respondent company is compelled to continue the petitioner in steady employment for a period of one year as long as the operations of such respondent necessitate the employment of persons holding positions similar or comparable to that occupied by the petitioner.

QUESTIONS PRESENTED

This case involves the interpretation of Section 8 of the Selective Training and Service Act of 1940.*

*The relevant portions of this section are as follows:

"Sec. 8 (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. In addition, each such person who is inducted into the land or naval forces under this Act for training and service shall be given a physical examination at the beginning of such training and service; and upon the completion of his period of training and service under section 3 (b), each such person shall be given another physical examination and, upon written request of the person concerned, shall be given a statement of medical record by the War Department: Provided, That such statement shall not contain any reference to mental or other conditions which

The two important questions in this case, as we see them, are:

(1) Does the position to which a veteran must be restored, carry with it a statutory right to full time employment for a period of one year, regardless of the seniority rights of the veteran or of other employees?

(2) Is a temporary "lay-off," in accordance with the properly applied seniority provisions of a collective bargaining agreement, a "discharge without cause" within the meaning of the Selective Training and Service Act?

It will be the purpose of this brief to support the proposition that the Act does not confer upon the veteran the right to full-time employment for one year without regard to the seniority rights of such veteran or of other employees, and that temporary "layoffs" such as those involved in this case do not constitute discharges within the meaning of the Act. It will be our position that the position to which a veteran is entitled to be restored under the Act is one which will, insofar as it is reasonably possible to

---

in the judgment of the Secretary of War or the Secretary of the Navy would prove injurious to the physical or mental health of the person to whom it pertains.

"(b) In case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position and (3) makes application for reemployment within ninety days after he is relieved from such training and service—

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so: * * *.

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." (50 U. S. C. A. 308.)

do so, place him in the same condition of employment as that which he would have occupied if he had not been inducted into the armed forces, but had remained in his former employment.

We shall further take the position that a temporary release from the actual performance of work in any period during which the employment relationship is continued in effect, is not a discharge.

ARGUMENT

General Statement

We should like to preface our discussion of the legal aspects of this case by a statement of the conditions which prevail in the field in which the involved statute must operate, and to direct attention to what would seem to be the fair and equitable purpose sought to be accomplished by the legislation.

It was apparent that with the advent of compulsory military training, certain hardships would flow from compelling employees to leave their jobs to enter military service unless some method was devised to assure them a fair and reasonable opportunity for reemployment at the end of their military service. The persons to be affected were engaged in all walks of life and in every conceivable type and condition of employment. The employment rights of these individuals were extremely varied. Some were employed under individual contracts which provided for employment for a fixed period of time. Some had their employment rights fixed by the terms of collective bargaining agreements. Others were employees at will, and their employment relationship could be terminated at any time with or without cause by the employer.

One question which arose with the proposal of compulsory military training was whether the employment rights of those who were inducted into the armed forces could be preserved. It was clear that in the absence of specific agreement, such employees would lose their employment rights. Upon their return, their opportunity for reemployment would rest solely in the discretion of the employer. In order to protect inducted employees against such eventualities, it was obvious that reliance could not be had upon the device of private contracts which would not be uniform in scope or certain of execution. Whatever relief was to be provided could arise only out of a uniformly applicable statute.

What, then, should be the nature of the protection to be afforded? A determination of this question required consideration not only of the rights to be accorded returning veterans but those of others as well. The employer had certain rights and obligations in the conduct of his business which could not in fairness be disregarded. The fellow employees of the inducted employee had certain rights which in equity and good conscience could not be destroyed. There was only one way in which the rights of all of the parties concerned could be fairly preserved, and that was to place the veteran in the same position in relation to his employer and his fellow employees as that which he would have occupied had he not been inducted, and to protect him in that position for a reasonable period of time after his return to the service of his employer. With the foregoing in mind, we shall proceed to a discussion of the Act.

I. THE POSITION TO WHICH A VETERAN IS ENTITLED TO BE RESTORED DOES NOT GUARANTEE HIM CONTINUOUS WORK FOR ONE YEAR WITHOUT REGARD TO HIS OR OTHER EMPLOYEES' SENIORITY RIGHTS.

The Act provides in effect that the employer shall restore the veteran to the same position which he occupied prior to entering military service or to a position of like seniority, status and pay, provided the employer's circumstances have not so changed as to make it impossible or unreasonable to do so. Since the petitioner in this case was admittedly restored to his position with the respondent company in accordance with the provisions of Section 8 of the Selective Training and Service Act, it becomes necessary to ascertain the nature of the rights which he acquired by such reinstatement. Specifically it must first be determined whether the position to which he was restored necessarily carried with it a statutory right to continuous work without regard to his or his fellow employees' contractual seniority rights. We shall accordingly discuss first the nature of the rights acquired by the petitioner when he was restored to his former position.

A. The Act Intended to Prevent the Loss of Rights and Benefits to Which the Veteran's Pre-existing Employment Contract Entitled Him.

The general designation used in the Act to describe the employment status to which the veteran should be restored is "position." He is to be restored to his former position, or one of like seniority, status and pay. It is clear that whatever else may have been intended by Congress, the relationship of employer and employee was to be reestablished if the veteran made application for reemployment under certain specified conditions.

The relationship of master and servant or of employer and employee is a contractual relationship. Thus, an employee's job or position is what his contract of employment makes it. It comes into being only by contract, and, as the product of the contract, carries with it all of the rights and obligations which the contract imposes. The position *may* be one which, under the contract, guarantees continuous work and compensation, but it does not follow that all positions would carry such rights. A position may be such as to continue the employment relationship through inactive periods without interruption and still not guarantee the continuous performance of duties or the receipt of compensation. This is true of employment which is seasonal in nature. The employee does not necessarily lose his position because he does not work. An employee does not lose his position when on vacation, furlough or leave of absence if the contract of employment or the collective bargaining agreement under which he works so provides. On the other hand, if the employment contract creates employment only at the will of the employer, it is possible that the existence of the position is dependent upon the actual performance of the duties of the position and the payment of compensation. There are obviously many conditions which might, by employment contract or collective bargaining agreement, constitute the position of an employee, but whatever they may be, neither the position nor the rights arising out of it are broader than the contract makes it.

It seems clear, therefore, that when Congress made provision for the restoration of the veteran to his former position or to a similar position, it intended to first reestablish the preexisting contractual relationship or one of a similar nature.

This alone was not sufficient to protect the veteran for the reason that some of the most valuable contract

rights of employees are cumulative in nature and depend upon an unbroken employment relationship. It was obvious, therefore, that the mere reestablishment of the preexisting contractual relationship without the protection of these cumulative rights would still leave the veteran in an inequitable position in relation to the other employees and would in effect penalize him because of his military service.

One of the most important of these cumulative rights is that of seniority. This right is one of preferential treatment in ratio of priority of service.* Such priority in itself does not create any right of seniority because seniority rights must originate in some contract.* Seniority as a right entitles the employee to preferences which are varied in nature and such as are specified in the creating agreement. It ordinarily determines the order in which employees will be laid off in a reduction of forces and the order in which they will be recalled when forces are increased. It frequently affords the basis upon which employees are permitted to acquire more desirable jobs and promotions. In order to implement seniority rights, each employee is given a seniority date, which usually corresponds with the date he was hired or the date upon which he assumed a particular job within a specified seniority group. All employees hired thereafter or coming into the seniority group subsequent to the date assigned a particular employee are junior to him and he has preference over them in all matters in which the agreement as to seniority provides for such preference. Seniority is one of the most

---

*"If such rights of seniority existed in favor of the plaintiff it must be by virtue of some contract between them and the company either express or implied." (*Boucher vs. Godfrey*, 119 Conn. 622, 178 Atl. 655.) "Although a right of seniority such as is here asserted is undoubtedly a valuable right, it arises only from agreement." (*Donovan vs. Travers*, 285 Mass. 167, 188 N. E. 705.). See also *Shaup vs. Grand International Brotherhood Locomotive Engineers*, 223 Ala. 202, 135 So. 327; *Aulich vs. Craigmyle*, 248 Ky. 676, 59 S. W. (2d) 560; *Ryan vs. New York Central R. Co.*, 267 Mich. 202, 255 N. W. 365.

highly valued rights which employees possess and is a reward for service as well as a protection against unemployment and dismissal after long service. Seniority rights ordinarily accumulate only so long as the employment relationship continues. Once the employment relationship is broken, whether by dismissal or by the voluntary action of the employee, the seniority rights usually terminate or at least are modified. If the employee is rehired even under the identical contract which previously governed his employment rights, he returns as a new employee with a seniority date as of the date of his reemployment or at least with a date less desirable than that which he possessed prior to the termination of his service.

Recognizing this fact, Congress made provision against a lapse of these rights as a result of the interruption of the employment relationship caused by military service by providing that the veteran should be restored "without loss of seniority." In case the veteran is reemployed in a position other than the one which he previously occupied, the Act provides that such position shall be one of "like seniority." To further clarify its purpose, Congress included in the Act a provision that the veteran should be considered as "having been on furlough or leave of absence during his period of training and service." This latter phrase has a considerable bearing upon the cumulative rights afforded the veteran under his prior contract of employment.

"Furlough" is a term usually used to describe a temporary lay-off resulting from a reduction in employee forces. It ordinarily results from the unilateral action of the employer and occurs when the conditions of the employer's business dictate a reduction in the number of employees required. A furlough is not regarded as a dismissal or discharge. The furloughed employee continues in and retains an employment relationship with the em-

ployer as long as he is on furlough and generally speaking is considered to be on furlough as long as it may reasonably be anticipated that he will return to actual service. Most important for our purpose here, however, is the fact that a furloughed employee with seniority rights, retains all of the rights to which his position entitled him prior to his being furfoughed. His seniority accumulates during his furlough and he is returned to work with his seniority rights unimpaired. He does not, however, acquire any greater rights than he would have acquired had he remained on his job.

A "leave of absence" is slightly different from a furlough in some respects, but the rights of an employee returning to work after a leave of absence are identical to those of an employee returning from a furlough, *i.e.*, the employee returns with the same rights he would have had if he had remained on his job and with no greater rights. The principal difference between a leave of absence and a furlough is that a leave of absence is usually granted at the request of an employee due to illness or some other personal reason, and is for a fixed period of time. The employment relationship continues and the employee has the right to return to work at the end of his leave of absence as long as there are junior employees working in his seniority group.

As to seniority, therefore, it seems clear that Congress intended that not only should the veteran's prior contract rights be established but that his cumulative rights should be preserved.

The effort of Congress with respect to these cumulative rights was not confined to seniority. The Act provides that the veteran "shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at

the time such person was inducted into such forces." This phrase clearly shows an intention that all cumulative rights to which the veteran was entitled under his prior agreement with his employer would continue to accrue during his service in the armed forces.

Taking all of the above quoted phrases into consideration, it is clear that as to seniority rights, Congress intended that the veteran would receive the same seniority as that which he had when he entered the service and would continue to accumulate any such rights during the entire time he was in military service. In effect, Congress has provided that the employment rights to which the veteran is restored are the same rights as those which the veteran would have had if he had remained in the employ of his former employer and had not entered military service.*

The involved sections of the Act have been so interpreted on a number of occasions. In the matter of the *Arbitration between Dow Chemical Co. and International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Local No. 804*, the arbitrator stated as follows:

> "The language of the statute under consideration is clear and not at all ambiguous. Obviously it is intended to assure those selected for service and training that their old job will be available with its emoluments and their seniority unimpaired just as though they had continued at work." (17 L. R. R. 646-647.)

In another arbitration entitled "*In Re Arbitration Between Timken Roller Bearing Company and United Steel Workers of America, etc.,*" 16 L. R. R. 158, 167, the arbitrator stated:

---

*See opinions of attorneys for *American Short Lines Railroad Association* and *Association of American Railroads* that the theory of super-seniority is not supported by the statute (15 L. R. R. 233).

"Nothing in the Act provides that the returning veteran is to get more than he had when he left. Not a word is to be found that even suggests that he is to be favored above his older fellow workers and given a seniority standing superior to theirs irrespective of the length of their employment with the employer. The veteran is not to lose by his term of service but likewise he is not to gain thereby."

In an arbitration between *Firestone Tire & Rubber Company and United Rubber Workers of America, etc.*, 17 L. R. R. 77, 99, the arbitrator stated:

"Neither the statute nor the collective bargaining agreement provides that the veteran shall have super, or superlative seniority rights. They are to be restored to the seniority rights they possessed upon induction plus all increments accruing thereto while they were in the armed forces."

The Solicitor of the Department of Labor had occasion to issue a memorandum dated May 8, 1945, for the information of and advice to the Conciliation Service of that Department (16 L. R. R. 485, 486). Among other things, the memorandum provided:

"Thus, it is our view that the returning veteran is entitled to his place on the seniority list in the business establishment and that the statute does not call for the displacement of senior workers in the event the force has been reduced to such an extent that the issue is raised.

"* * * The Department of Labor interprets the term 'discharge' as applying only to the formal termination of an employee's connection with the company. It does not apply to 'lay-offs.' Accordingly the status of a restored veteran during the first year of his return to employment would depend on his position on the seniority list."

The National War Labor Board, in the handling of disputes arising out of the negotiation of collective bargaining agreements, has had occasion a number of times to deal with the rights of retrning veterans. In approving or disapproving proposed rules relating to the rights of returning veterans the Board has been compelled to give some consideration to the provisions of the Selective Training and Service Act. In numerous decisions, it has interpreted the Act to mean that returning veterans are not entitled to super-seniority. In the case of the *Scovill Manufacturing Company and International Union of Mine and Smelter Workers, etc.*, the company had requested that a rule be added to the collective bargaining agreement providing that in case of lay-off a veteran should not be laid off under the seniority rules but should have prior claim for one year to employment. With respect to this question, the Board said:

> "The company's request should be denied because the panel is of the opinion that the request, as well as Memorandum 190-A, is inconsistent with the intent of the Selective Service Act. The intent of the latter is not to give a positive benefit to the returning serviceman but to protect him against loss of seniority he would otherwise have obtained. It is important for the Board to take into account the reason for the panel's rejection of the company's clause.
>
> "Recommendation
>
> "The company's request on seniority and returning servicemen be denied." (21 W. L. R. 200, 202.)*

*For other cases in which the War Labor Board has passed upon agreements involving rights under the Selective Service Act, see the *Pacific Cotton Mills case*, 21 W. L. R. 507; *Keystone Lime Works, Inc.*, 21 W. L. R. 495; *Goodyear Tire & Rubber Company case*, 23 W. L. R. 89; *Pittsburgh Plate Glass case*, 24 W. L. R. 104; *Erdette Hosiery case*, 24 W. L. R. 209; *General Motors Corporation case*, 24 W. L. R. 155; *American Cystoscope Makers case*, 24 W. L. R. 196; *Murray case*, 25 W. L. R. 217.

As far as we have been able to determine, there has been no case in which the War Labor Board has approved any contract provision, entered any order, or made any comment that recognizes in the returning veteran any right, status or privilege which such veteran would not have had if he had not entered the service but had continued in his employment.

In the case of *Hall vs. Union Light, Heat and Power Company*, 53 F. Supp. 817, 818, the court said:

> "The whole context of the statute and the purpose for which it became the law was to minimize insofar as possible the sacrifices of those who are required to enter the military service by assuring them that their jobs, their pay, and their status with their employers would be held inviolate and secured to them in order that they might *return to the status quo* if they made application within 40 days after they severed their connections with the military forces. The Act uses the language that they shall be *considered as having been on furlough or leave of absence during the period of training and service.* * * * *It is the whole purpose and spirit of the Act in the light of a reasonable construction of the language used to put him in the identical position he was before he entered military service.*" (Emphasis supplied.)

In further support of the foregoing interpretation of the Act, we direct the Court's attention to *Olin Industries, Inc., vs. Joseph Barnett* (D. C. S. D. Ill.) and *George Droste vs. Nash-Kelvinator Corporation* (D. C. E. D. Michigan). These cases will undoubtedly be discussed in the briefs of the parties, and we shall not extend this brief by quoting from them. It is sufficient to say that both courts held that the Act conferred upon the returning veteran no greater seniority rights than those he would have had if he had not left the service of his employer to enter the armed forces.

A consideration of the actual language of the Act discussed above shows a clear intention on the part of Congress to do two things, first, to reestablish the previously existing contract rights between the veteran and his former employer or rights of a similar nature, and second, to preserve any cumulative rights arising out of such contracts which in the absence of statutory protection would be lost to the veteran.

II. A TEMPORARY RELEASE FROM WORK DURING A CONTINUING EMPLOYMENT RELATIONSHIP IS NOT A DISCHARGE WITHIN THE MEANING OF THE ACT.

We have shown above that the position to which the petitioner was restored gave him no greater employment rights than those which he would have possessed if he had remained in his former employment and not entered military service. We now come to a consideration of that part of the Act which provides that a restored veteran "shall not be discharged from such position without cause within one year after such restoration."

The word "discharge" as used in employment relationships is descriptive only of the situation in which there has been, by the action of an employer, a complete termination of the employment relationship and all of the rights and obligations incident thereto.*

*No set form of words is necessary to constitute a discharge but any words or acts that show a clear intention on the part of a master to dispense with the servant's services and which are equivalent to a declaration to the servant that his services will no longer be accepted are sufficient." (39 C. J. 79, 80.) "The term 'discharge' means to cease to employ." (*Burroughs vs. Riss and Co.*, 179 S. W. (2d) 473 (Mo. App.).) "A discharge is a termination of employment at the will of the employer with prejudice because of some fault on the part of the worker." (*International Association of Machinists vs. State*, 15 So. (2d) 485.) "A discharge presumptively means that the employer no longer needs or desires his services; that he is done with him and all contract relations are at an end." (*Stitt vs. Locomotive Engineers Mutual Protective Association*, 142 N. W. 1110, 1113; 177 Mich. 207.)

A mere denial of a right to work for a temporary period, during which the employee continues to retain a definite contract right to be restored to work under specified conditions, is not a discharge. The temporary release from work during which employment rights are retained is described in well recognized terms in the field of labor relations. If it is caused by a reduction in forces it is usually designated as a "lay-off" or a "furlough." If it is for certain other causes, it may be referred to as a "leave of absence." A vacation is also a temporary release from work without termination of the employment relationship. Congress used the term "furlough" twice in Section 8 of the Act and it must be assumed that it was aware of its meaning in employment relationships. If it had intended that no restored veteran could be temporarily released from service during a period of one year due to a reduction in forces, regardless of seniority, it is inconceivable that it would not have used the word which it had itself recognized as being descriptive of such a situation.

There is no language in the Act which indicates any intention on the part of Congress to use the word "discharge" other than in its commonly accepted meaning. On the contrary, any other interpretation would be inconsistent with the clear purpose of the Act as shown by other words used in it.

It follows that the petitioner was not discharged on the nine days in question, and that the refusal of the respondent company to employ him on such days because of the proper application of his seniority rights constituted no violation of the Act.

III. THE GRANTING OF GREATER EMPLOYMENT RIGHTS TO REEMPLOYED VETERANS THAN THOSE WHICH THEY WOULD HAVE ACQUIRED IF THEY HAD NOT LEFT THEIR FORMER EMPLOYMENT CANNOT BE MORALLY JUSTIFIED.

Further evidence that Congress intended only to restore the veteran to his pre-induction status is found in a consideration of the equities involved. The effect of "super-seniority" is to give a preference to reemployed veterans over all civilian workers regardless of the prior status of either, and for no other reason than that the former are veterans. If the prior employment status is ignored and the reemployed veterans are preferred over all civilians, such preference must be considered as a reward for military service. So considered, there is no reason why such preference should be conferred only upon formerly employed veterans. It must be remembered that the Act confers no employment rights upon veterans who did not leave an employment status when they entered the armed forces. Such veterans return to civilian life with no employment rights. They revert to their former status. It is not reasonable to conclude that having left one group of veterans with no greater employment rights than those which they possessed when they left for military service, Congress intended to confer upon the other group greater employment rights than they previously held. Such unjust discrimination among the veterans could not be equitably justified. On the other hand, if, as we have pointed out above, both the formerly employed veterans and the veterans who were not employed all revert to their pre-existing employment status, no discrimination will occur among them and a fair and equitable result will be achieved.

These are not the only inequities which will result from the application of the principles advocated by the

petitioner. The above described statutory purposes will be violated in another manner. Nothing should be more clear than the principle that whatever benefits are accorded the veteran because of military service, their cost should be borne by the people as a whole. No individual or class of individuals through purely fortuitous circumstances should be compelled to bear the burden of such benefits. Such will be the result, however, if the theory of super-seniority is applied. The decision of the trial court means that a veteran of World War II who has once been restored to employment will have priority over *all* other employees performing the same or similar work, without regard to the prior contractual status either of the veteran or civilian employee. The oldest non-veteran employee (in point of service) could be replaced by a reinstated veteran who had been employed for only a week before he was inducted. A veteran of World War I could be displaced by a veteran of World War II, for no other reason than that the latter was a veteran of World War II.

The right of every civilian to continue to work would be subordinated to that of a formerly employed veteran, regardless of the status of either. The individual civilian and his family would be compelled to bear the entire burden of the benefit accorded the veteran, even though the employment rights of the civilian were in no way connected with the veteran's military service. No fair and equitable theory can justify such a result, nor does the prevention of a non-veteran from succeeding to the pre-existing employment rights of the veteran require it. No one can deny the propriety of protecting employment rights which a veteran had established prior to his entry into the armed forces and of preventing civilians who stayed at home from depriving the veteran of those rights at the veteran's expense. It is quite another matter, however, to contend that the veteran should acquire rights

which he would not have had if he had remained a civilian and place the cost of such rights upon arbitrarily selected individuals. The resulting discrimination between veterans and civilians, we submit, must by its very inequity, be outside of the statutory purpose and not morally justified.

IV. THE GRANTING TO REEMPLOYED VETERANS OF GREATER EMPLOYMENT RIGHTS THAN THOSE WHICH THEY WOULD HAVE ACQUIRED IF THEY HAD NOT LEFT THEIR FORMER EMPLOYMENT IS IMPRACTICAL AND DESTRUCTIVE OF LONG ESTABLISHED RIGHTS.

Collective bargaining has, with the encouragement and protection of federal law, become the recognized medium by which rights and obligations of most employees are established and maintained. Agreements between employees' representatives and employers now govern rates of pay, rules and working conditions of the great majority of certain types of employees. As pointed out above, it is these agreements which create seniority as a legally enforceable right. It follows that any statute which refers to seniority as a standard and which purports to create or preserve any rights of veterans in connection therewith must have been enacted in contemplation of the existence of such rights. The theory of super-seniority has the effect of granting the veteran the right to continuous work for one year without regard to the seniority rights of veterans or their fellow employees.

We do not wish to burden this brief with an extended discussion of the practical effect of this interpretation of the statute, but believe that a few examples of the results which may be expected will be enlightening.

It is a matter of common knowledge that many em-

ployers, due to the tremendous volume of production required by the war, greatly extended their operations with a resulting increase in the size of their working forces. Furthermore, because of the induction of millions of men into the armed forces, there was a tremendous increase in employee turnover. As a result of this turnover, the same position of employment was often held by many persons as each in turn was called to military service. With the termination of hostilities, and the resulting cancellation of war contracts, many industrial concerns have been compelled to cut their working forces to peacetime levels and to turn from the production of war materials to their normal peacetime pursuits. As a result of this reduction of working forces, many employers find themselves in the position of having more former employees with veterans' reemployment rights than there are jobs available in their existing working force. In other cases, the formerly employed veteran can be restored to and continued in actual work only if the oldest, most experienced and most trusted employees are displaced. Thus, if seniority rights are not preserved and recognized, both for the veteran and the civilian employee, the employer will find himself with a working force entirely unfamiliar with his normal peacetime business.

This condition would continue as to each veteran for a period of one year, at which time his contractual seniority rights would again become applicable and the veteran would be subject to displacement if he did not have sufficient seniority to permit him continuous work. In the meantime, however, the displaced civilian may, from economic necessity, have been compelled to accept other employment and lose his seniority rights. The employer would therefore be required to dispense with the services of such employees. We cannot believe that it was the intention of Congress to accomplish any such result.

While the most significant fact in the legislative history of this Act is the almost total lack of discussion of reemployment rights, both in the committee hearings and on the floor of Congress, there was one statement made during a debate on the floor of Congress which bears upon the issue here. While the bill which subsequently became the present Act was being considered on the floor, Mr. Barkley made the following statement:

> "There might be numerous instances in which in the period of the year covered by the absence of regular employees the conditions of the company would have so changed that they could not take on additional employees. They might even have fewer regular employees at the end of the year than they had at the time the individual employee entered the service and in cases of that sort it seems to me we could not require a company to restore the employment of men who, if there had been no military service, might have been discharged during the year because of a necessary reduction of the company's forces.
>
> "While I do want to hold out the hope and the moral obligation and the legal obligation insofar as we can that these men are not to lose their *status* when they return by reason of their service to their country, I do not think that it would be fair to undertake to deceive the American people into the belief that every individual who is called into service can be restored to his particular job." (Emphasis supplied.) (Congressional Record, Volume 86, Part 9, page 10,108.)

If the foregoing statement may be taken as an indication of the purpose which Congress sought to accomplish, it is clear that there was no intention to disturb the employment status of workers whose employment rights were unconnected with the induction into the military service of their fellow employees. It recognizes the prac-

tical difficulties of the employer and gives emphasis to the position that the extent of the benefit sought to be conferred upon the veteran was a protection against any loss of his former employment status.

Furthermore, if Congress had intended to set aside long established and valued contract rights of employees which for the most part were acquired under the protection of other federal statutes, it would have done so only in the clearest and most unequivocal language.

V. AS INTERPRETED BY THE DISTRICT COURT, SECTION 8 OF THE SELECTIVE TRAINING AND SERVICE ACT IS UNCONSTITUTIONAL.

Having shown that the theory of super-seniority is not supported by the language of the statute, by any concept of moral justice, or by a practical consideration of its application to employment problems in industry generally, we should now like to point out that such an interpretation of the statute is unsound for the further reason that, if adopted, it would cast a serious question on the constitutionality of the Act.

It is well established that the courts should not adopt an interpretation of any Act of Congress which will place in doubt the constitutionality of that Act.

> "Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." (*Interstate Commerce Commission vs. Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14, p. 40.)
>
> "We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." (*National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 300 U. S. 1, p. 30.)

See also *United States vs. Shreveport Grain and Elevator Co.*, 287 U. S. 77.

The interpretation advocated by the selective service authorities renders the Selective Service Act subject to serious attack on the ground that, so interpreted, it would constitute the taking of property without due process of law in violation of the Fifth Amendment to the Constitution. Where a collective bargaining contract provides that employees shall receive certain preferences in the matter of employment on the basis of seniority, and a statute is interpreted in such manner as to give to certain of these employees a preferred status, based on their past services in the armed forces, and regardless of their seniority, it is obvious that such a statute operates to take from other employees their vested contract rights.

Rights vested in individuals as a result of contract are subject to the protection of the Fifth Amendment. Speaking of the coverage of this amendment, the Supreme Court, in the case of *Lynch vs. United States*, 292 U. S. 571, 579, said:

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a state of the United States."
>
> "The Constitution, as it many times has been pointed out, does not in terms prohibit Congress from impairing the obligation of contracts as it does the states. But as far back as *Calder vs. Bull*, 3 Dall. 386, 388, 1 L. Ed. 648, 649, it was said that among other acts which Congress could not pass without exceeding its authority was 'a law that destroys or impairs the lawful private contracts of citizens.' The broad reach of that statement has been restricted (*Legal Tender Cases*, 12 Wall. 457, 539, 550, 20 L. Ed. 287, 311, 312); but the principle which it includes has never been repudiated, although the extent to which it may be carried has not been definitely fixed." (*Continental Ill. Natl.*

Bank & Trust Co. vs. Chicago, Rock Island & Pacific Ry. Co., 294 U. S. 648, page 680.)

"It is everywhere recognized that the freedom of the people to enter into and carry out contracts in respect of their property and private affairs is a matter of great public concern and that such liberty may not lightly be impaired. Generally speaking, that right is protected by the due process clauses of the 5th and 14th Amendments. It is also well established by the decisions of this court that such liberty is not absolute or universal, and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created." (*Highland vs. Russell Car & Snow Plow Co.*, 279 U. S. 253, page 261.)

In light of numerous decisions, it is not subject to doubt that seniority rights are vested contract rights of the individual employee. Although they may be terminated or modified by *bona fide* joint action of the employer and the collective bargaining representative, such rights may not be arbitrarily restricted, and have been recognized as entitled to protection in the courts.

"Rights of seniority, given under a collective-bargaining contract between a railroad company and its employees, are such property rights as will, in a proper case, be protected by injunctive relief in a court of equity." (*Evans vs. Louisville & Nashville R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611.)

"The decisions, so far as we have been able to review them, recognize that 'seniority' is a contract right, and that during the term of its existence (it) cannot be taken away, except in the manner provided in the agreement." (*Gleason vs. Thomas*, 117 W. Va. 550, 186 S. E. 304.)

Seniority rights have been held to be "valuable property" (*Donovan vs. Travers*, 285 Mass. 167, 188 N. E.

705); "property rights" within the protective jurisdiction of a court of equity (*Ledford vs. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 298 Ill. App. 298, 18 N. E. (2d) 568); and as being "contract rights" which are "entitled to protection by the courts" (*Fine vs. Pratt*, Tex. Civ. App. 150, S. W. (2d) 308).

Specifically, seniority rights have in a number of cases been held to constitute "property" within the purview of the Fifth Amendment. In an action to review a decision of the National Railroad Adjustment Board* (*Griffin vs. Chicago Union Station Co.*, 13 F. Supp. 722), the court stated that in its opinion "the seniority rights, which had been accorded to the plaintiff by the Union Station Company and which he held prior to the decision of the National Railroad Adjustment Board, First Division, were property within the meaning of the Fifth Amendment to the Federal Constitution." (Pages 723-724.)

In the case of *Stephenson vs. New Orleans and N. E. R. Co.*, 180 Miss. 147, 177 So. 509, the court said, "The seniority rights of an employee constitute property within the meaning of the Fifth Amendment to the Federal Constitution." In the case of *Nord vs. Griffin*, 86 F. (2d) 481, the court set aside an award of the National Railroad Adjustment Board made without notice to the plaintiff on the ground that his seniority rights were of such nature that to deprive him of them in a proceeding of which he was not notified constituted a violation of due process. In the case of *Estes vs. Union Terminal Co.*, 89 F. (2d) 768, the court appears to have followed much the same reasoning.

It may be fairly concluded, therefore, that the seniority rights of employees are protected by the Fifth Amend-

*The National Railroad Adjustment Board is an administrative board organized under the provisions of the Railway Labor Act for the handling of disputes arising out of grievances concerning rates of pay, rules and working conditions.

ment against any taking without due process. It is clear that the Selective Service Act as interpreted by the Selective Service authorities would have the effect of taking away or abridging the seniority rights of employees not in the armed services. It is, of course, true that every taking of vested rights does not violate the Fifth Amendment. Only when the taking is accomplished without due process of law is it condemned.

> "And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." (*Nebbia vs. New York*, 291 U. S. 502, 525.)

No one doubts the power of Congress to make suitable provision for the compensation of those who have served the nation in war. Such compensation, however, must be made on a reasonable basis. It may not be arbitrary. Under the theory of super-seniority, property rights of individuals would be taken away in order that the perquisities thereof could be transferred to other individuals as a reward to the latter for services rendered to the public. As we have pointed out above, if such services are to be rewarded by government enactment, the reward should be at the expense of the whole nation, not at the expense of individual citizens who are arbitrarily selected to bear the whole burden. Without further discussion of this point, it is reasonable to conclude that such a system of rewards at individual expense would be of extremely doubtful validity from a constitutional point of view.

In summary we submit that super-seniority contemplates a taking of vested property rights from certain individuals and transferring them to others without compensation to the former; that such a taking would be wholly

arbitrary and would hence be lacking in due process; that at the very least such an interpretation of this statute would cast grave doubts on its constitutionality.

CONCLUSION

We have shown that the position to which a formerly employed veteran is entitled to be restored does not guarantee him continuous work for one year without regard to his own or other employees' seniority rights and that Congress intended only to reestablish the former contractual employment relationship of the veteran and to preserve and protect any cumulative rights which the veteran would have acquired had he remained in his former employment and not entered military service.

In support of our position, we have pointed out that the plain language of the statute requires that the Act be so interpreted; that a temporary release from work during a continuing employment relationship does not constitute a discharge; that unless the Act is so interpreted, it will result in discrimination among veterans and between veterans and civilian workers which cannot be morally justified; that any other interpretation will lead to impractical results and destroy long established and valuable contract rights which are encouraged and protected under other

federal law, and that any other construction places the constitutionality of the Act in grave doubt.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
By FRANK L. MULHOLLAND,
741 Nicholas Bldg.,
Toledo 4, Ohio,
CLARENCE M. MULHOLLAND,
741 Nicholas Bldg.,
Toledo 4, Ohio,
WILLARD H. MCEWEN,
741 Nicholas Bldg.,
Toledo 4, Ohio,
Its Attorneys.

Of Counsel:
MULHOLLAND, ROBIE & MCEWEN,
741 Nicholas Bldg.,
Toledo 4, Ohio.